IAC-AH-SC-V2

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/04308/2019**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On the 27th September 2022	**On the 3rd January 2023**

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

JK
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr R Toal and Ms M Sardar, Counsel instructed by Turpin and Miller Solicitors
For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008
Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

DECISION AND REASONS

1. The Appellant is a citizen of Somalia and his date of birth is 14 February 1991.

2. The Appellant has been anonymised. I have departed from the principle of open justice, properly applying the relevant guidance.[1] The Appellant's mother has disclosed personal information regarding her health and there is personal information relating to the Appellant's brother's health. I have decided anonymity of the Appellant and the witnesses is necessary to ensure that his mother and brother are not identified.

3. In a decision dated 8 October 2020 I set aside the decision of the First-tier Tribunal (Judge Zahed) to dismiss the Appellant's appeal under Articles 3 and 8 of the ECHR. I made my decision without a hearing pursuant to Rule 34 of the 2008 Procedure Rules.[2]

4. The salient parts of the error of law decision read[3] as follows:

> "22. The judge erred because he did not consider all material matters when assessing the risk presented by the Appellant in the United Kingdom in the context of Article 8. Furthermore, he did not consider material evidence namely the report of Mr Hoehne concerning risk on return. I set aside the decision of the First-tier Tribunal.
>
> 23. The judge did not make findings in respect of Section 117C(4)(b) and (c). It was not accepted by the Secretary of State (see the decision letter) that the Appellant was socially and culturally integrated in the United Kingdom or that there would be very significant obstacles to integration. The Tribunal will make findings on each limb of Section 117C(4).
>
> 24. The judge was entitled to draw a reasonable inference that the Appellant's family in USA and Sweden could assist the Appellant on return to Somalia. In any event the judge found the Appellant's family and friends in the United Kingdom. That finding is maintained. The Tribunal will need to reconsider proportionality considering all material matters and assess Article 3 in the light of Mr Hoehne's report."

5. I made directions giving the parties the opportunity to make representations as regards venue for a rehearing. Having considered those representations and the Practice Statement of the Senior President of Tribunals, I decided that the matter should be reheard in the Upper Tribunal. There was another issue raised by Ms Sardar at this time in relation to my error of law decision and the application of s.117C(4)(a) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). I directed that the matter would be dealt with at the start of the resumed hearing and made further directions.

[1] UTIAC Guidance note 2022 No 2: Anonymity Orders and Hearings in Private
[2] The Tribunal Procedure (Upper Tribunal) Rules 2008
[3] The Practice Statement of the Immigration and Asylum Chambers of the First-tier and Upper Tribunal 25 September 2012 (as amended 11 June 2018)

The background

6. The Appellant came to the UK on 8 June 2005 with his mother and siblings. The family had been granted a family reunion visa and indefinite leave to enter. They were joining their father who had been granted refugee status in the UK.

7. On 12 December 2009 the Appellant was convicted of attempted rape, sexual assault and causing a female to engage in sexual activity without consent and theft. He was sentenced to four years' imprisonment and required to sign the sex offenders' register (SOR) indefinitely. On 28 September 2010 the Appellant was informed of his liability to deportation.

8. On 17 March 2013 he was convicted of failure to comply with the notification of the SOR. He received a sentence of imprisonment of eight weeks suspended for two years. He has another conviction for failing to comply with the notification requirements of the SOR on 22 February 2018.

9. On 17 July 2014 he was convicted of possessing a class B drug. He was sentenced to a community order. He has five convictions from 26 September 2014 -27 October 2015 for failing to comply with notification requirements of this community order.

10. On 18 April 2018 the Appellant was convicted of supplying class A drugs namely heroin. He was sentenced to eighteen months' imprisonment. The offence was committed in 2013.

11. On 26 September 2011 the Appellant's indefinite leave was revoked. He did not appeal against this decision. He was granted discretionary leave on 16 October 2016 until 7 April 2019. A deportation order was made on 19 February 2019.

The Legal Background

12. The Appellant is a foreign criminal as defined by s.32(1) of the UK Borders Act 2007 ("the 2007 Act"). The Secretary of State must make a deportation order pursuant to s.32(5). On 19 February 2019 the Secretary of State made a deportation order against the Appellant in accordance with s.32(5) of the 2007 Act pursuant to s.5(1) of the Immigration Act 1971 ("the 1971 Act"). On the same day the Secretary of State made a decision to refuse the Appellant's human rights against which the Appellant appeals (under s82 of the 2002 Act) on the grounds that the decision breaches his rights under Article 3 and Article 8.

13. In respect of Article 3, I have to consider whether returning the Appellant to Somalia would amount to treatment including torture or inhuman or degrading treatment or punishment on account of his circumstances on return to Somalia. If the answer is affirmative, the appeal succeeds. (Article 3 is a non-derogable right).

14. The UT gave guidance in OA (Somalia) Somalia CG [2022] UKUT 00033 concerning return to Somalia. The head note reads as follows:

> *"In an Article 3 'living conditions' case, there must be a causal link between the Secretary of State's removal decision and any 'intense suffering' feared by the returnee. This includes a requirement for temporal proximity between the removal decision and any 'intense suffering' of which the returnee claims to be at real risk. This reflects the requirement in Paposhvili [2017] Imm AR 867 for intense suffering to be 'serious, rapid and irreversible' in order to engage the returning State's obligations under Article 3 ECHR. A returnee fearing 'intense suffering' on account of their prospective living conditions at some unknown point in the future is unlikely to be able to attribute responsibility for those living conditions to the Secretary of State, for to do so would be speculative."*
>
> *Country Guidance*
>
> 1. *The country guidance given in paragraph 407 of MOJ (replicated at paragraphs (ii) to (x) of the headnote to MOJ) remains applicable.*
> 2. *We give the following additional country guidance which goes to the assessment of all the circumstances of a returnee's case, as required by MOJ at paragraph 407(h).*
> 3. *The Reer Hamar are a senior minority clan whose ancient heritage in Mogadishu has placed it in a comparatively advantageous position compared to other minority clans. Strategic marriage alliances into dominant clans has strengthened the overall standing and influence of the Reer Hamar. There are no reports of the Reer Hamar living in IDP camps and it would be unusual for a member of the clan to do so.*
> 4. *Somali culture is such that family and social links are, in general, retained between the diaspora and those living in Somalia. Somali family networks are very extensive and the social ties between different branches of the family are very tight. A returnee with family and diaspora links in this country will be unlikely to be more than a small number of degrees of separation away from establishing contact with a member of their clan, or extended family, in Mogadishu through friends of friends, if not through direct contact.*
> 5. *In-country assistance from a returnee's clan or network is not necessarily contingent upon the returnee having personally made remittances as a member of the diaspora. Relevant factors include whether a member of the returnee's household made remittances, and the returnee's ability to have sent remittances before their return.*
> 6. *A guarantor is not required for hotel rooms. Basic but adequate hotel accommodation is available for a nightly fee of around 25USD. The Secretary of State's Facilitated Returns Scheme will be sufficient to fund a returnee's initial reception in Mogadishu for up to several weeks, while the returnee establishes or reconnects with their network or finds a guarantor. Taxis are available to take returnees from the airport to their hotel.*

7. *The economic boom continues with the consequence that casual and day labour positions are available. A guarantor may be required to vouch for some employed positions, although a guarantor is not likely to be required for self-employed positions, given the number of recent arrivals who have secured or crafted roles in the informal economy.*

8. *A guarantor may be required to vouch for prospective tenants in the city. In the accommodation context, the term 'guarantor' is broad, and encompasses vouching for the individual concerned, rather than assuming legal obligations as part of a formal land transaction. Adequate rooms are available to rent in the region of 40USD to 150USD per month in conditions that would not, without more, amount to a breach of Article 3 ECHR.*

9. *There is a spectrum of conditions across the IDP camps; some remain as they were at the time of MOJ, whereas there has been durable positive change in a significant number of others. Many camps now feature material conditions that are adequate by Somali standards. The living conditions in the worst IDP camps will be dire on account of their overcrowding, the prevalence of disease, the destitution of their residents, the unsanitary conditions, the lack of accessible services and the exposure to the risk of crime.*

10. *The extent to which the Secretary of State may properly be held to be responsible for exposing a returnee to intense suffering which may in time arise as a result of such conditions turns on factors that include whether, upon arrival in Mogadishu, the returnee would be without any prospect of initial accommodation, support or another base from which to begin to establish themselves in the city.*

11. *There will need to be a careful assessment of all the circumstances of the particular individual in order to ascertain the Article 3, humanitarian protection or internal relocation implications of an individual's return.*

12. *If there are particular features of an individual returnee's circumstances or characteristics that mean that there are substantial grounds to conclude that there will be a real risk that, notwithstanding the availability of the Facilitated Returns Scheme and the other means available to a returnee of establishing themselves in Mogadishu, residence in an IDP camp or informal settlement will be reasonably likely, a careful consideration of all the circumstances will be required in order to determine whether their return will entail a real risk of Article 3 being breached. Such cases are likely to be rare, in light of the evidence that very few, if any, returning members of the diaspora are forced to resort to IDP camps.*

13. *It will only be those with no clan or family support who will not be in receipt of remittances from abroad and who have no real prospect of securing access to a livelihood on return who will face the prospect of living in circumstances falling below that which would be reasonable for internal relocation purposes.*

14. There is some mental health provision in Mogadishu. Means-tested anti-psychotic medication is available.

15. Hard drugs are not readily available in Mogadishu, and the focus of substance abuse is khat, cannabis, alcohol and tobacco. It is not reasonably likely that an ordinary returnee, without significant means or pre-existing connections to criminal elements in Mogadishu, would be able to procure hard drugs, such as heroin and cocaine, upon their return.

Other country guidance given by MOJ

16. The country guidance given at paragraph 408 of MOJ ((xi) of the headnote) is replaced with the country guidance at paragraph (13), above. Paragraph 425 of MOJ ((xii) of the headnote) should be read as though the reference to 'having to live in conditions that will fall below acceptable humanitarian standards' were a reference to 'living in circumstances falling below that which would be reasonable for internal relocation purposes".

15. In Ainte (material deprivation -Art 3 – AM (Zimbabwe)) [2021] UKUT 00230 the UT considered whether Article 3 could be engaged by conditions of extreme material deprivation and the test to be applied in such a case. The headnote reads as follows:

(i) Said [2016] EWCA Civ 442 is not to be read to exclude the possibility that Article 3 ECHR could be engaged by conditions of extreme material deprivation. Factors to be considered include the location where the harm arises, and whether it results from deliberate action or omission.

(ii) In cases where the material deprivation is not intentionally caused the threshold is the modified N test set out in AM (Zimbabwe) [2020] UKSC 17. The question will be whether conditions are such that there is a real risk that the individual concerned will be exposed to intense suffering or a significant reduction in life expectancy.

(iii) The Qualification Directive continues to have direct effect following the UK withdrawal from the EU.

16. If the appeal cannot succeed under Article 3, I must consider whether the decision of the Secretary of State breaches the Appellant's right to private and/or family life under Article 8. The statutory framework for consideration of Article 8 claims is s.117 of the 2002 Act which I set out below.

Section 117 of the 2002 Act:-

"**117A Application of this Part**

(1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—

(a) breaches a person's right to respect for private and family life under Article 8, and

(b) as a result would be unlawful under section 6 of the Human Rights Act 1998.

(2) In considering the public interest question, the court or tribunal must (in particular) have regard—

(a) in all cases, to the considerations listed in section 117B, and

(b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.

(3) In subsection (2), 'the public interest question' means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

117B Article 8: public interest considerations applicable in all cases

(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—

(a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to—

(a) a private life, or

(b) a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom.

117C Article 8: additional considerations in cases involving foreign criminals

(1) The deportation of foreign criminals is in the public interest.

(2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.

(3) In the case of a foreign criminal ('C') who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.

(4) Exception 1 applies where—

(a) C has been lawfully resident in the United Kingdom for most of C's life,

(b) C is socially and culturally integrated in the United Kingdom, and

(c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.

(5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.

(6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.

(7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted.

117D Interpretation of this Part

(1) In this Part—

'Article 8' means Article 8 of the European Convention on Human Rights;

'qualifying child' means a person who is under the age of 18 and who—

(a) is a British citizen, or

(b) has lived in the United Kingdom for a continuous period of seven years or more;

'qualifying partner' means a partner who—

(a) is a British citizen, or

(b) who is settled in the United Kingdom (within the meaning of the Immigration Act 1971 — see section 33(2A) of that Act).

(2) In this Part, 'foreign criminal' means a person—

(a) who is not a British citizen,

(b) who has been convicted in the United Kingdom of an offence, and

(c) who—

(i) has been sentenced to a period of imprisonment of at least 12 months,

(ii) has been convicted of an offence that has caused serious harm, or

(iii) is a persistent offender.

(3) For the purposes of subsection (2)(b), a person subject to an order under—

(a) section 5 of the Criminal Procedure (Insanity) Act 1964 (insanity etc),

(b) section 57 of the Criminal Procedure (Scotland) Act 1995 (insanity etc), or

(c) Article 50A of the Mental Health (Northern Ireland) Order 1986 (insanity etc),

has not been convicted of an offence.

(4) In this Part, references to a person who has been sentenced to a period of imprisonment of a certain length of time—

(a) do not include a person who has received a suspended sentence (unless a court subsequently orders that the sentence or any part of it (of whatever length) is to take effect);

(b) do not include a person who has been sentenced to a period of imprisonment of that length of time only by virtue of being sentenced to consecutive sentences amounting in aggregate to that length of time;

(c) include a person who is sentenced to detention, or ordered or directed to be detained, in an institution other than a prison (including, in particular, a hospital or an institution for young offenders) for that length of time; and

(d) include a person who is sentenced to imprisonment or detention, or ordered or directed to be detained, for an indeterminate period, provided that it may last for at least that length of time.

(5) If any question arises for the purposes of this Part as to whether a person is a British citizen, it is for the person asserting that fact to prove it."

17. It is not challenged that the Appellant is a foreign criminal and a serious offender, having been sentenced to more than four years' imprisonment.[4] It was agreed by the parties that in order to succeed under Article 8, he must establish very compelling circumstances in the context of s.117C(6) of the 2002 Act. The Supreme Court has recently considered the very compelling circumstances test in HA (Iraq) v SSHD [2022] UKSC 22 and stated as follow:-

"45. The difference in approach called for under section 117C(6) as opposed to 117C(5) was conveniently summarised by Underhill LJ at para 29 of his judgment as follows:

(A) In the cases covered by the two Exceptions in subsections (4)-(5), which apply only to medium offenders, the public interest question is answered in favour of the foreign criminal, without the need for a full proportionality assessment. Parliament has pre-determined that in the circumstances there specified the public interest in the

[4] The Appellant is foreign criminal as defined in s.117D(2) of the 2002 Act and s.32(1) of the 2007 Act.

deportation of medium offenders does *not* outweigh the article 8 interests of the foreign criminal or his family: they are, given, so to speak, a short cut. The consideration of whether those Exceptions apply is a self-contained exercise governed by their particular terms.

(B) In cases where the two Exceptions do not apply - that is, in the case of a serious offender or in the case of a medium offender who cannot satisfy their requirements - a full proportionality assessment is required, weighing the interference with the article 8 rights of the potential deportee and his family against the public interest in his deportation. In conducting that assessment the decisionmaker is required by section 117C(6) (and paragraph 398 of the Rules) to proceed on the basis that 'the public interest requires deportation unless there are very compelling circumstances over and above those described in Exceptions 1 and 2.

46. In *Rhuppiah v Secretary of State for the Home Department* [2016] 1 WLR 4203 at para 50 Sales LJ emphasised that the public interest 'requires' deportation unless very compelling circumstances are established and stated that the test 'provides a safety valve, with an appropriately high threshold of application, for those exceptional cases involving foreign criminals in which the private and family life considerations are so strong that it would be disproportionate and in violation of article 8 to remove them.

47. As explained by Lord Reed in his judgment in *Hesham Ali v Secretary of State for the Home Department* [2016] UKSC 60; [2016] 1 WLR 4799 at para 38:

> '… great weight should generally be given to the public interest in the deportation of [qualifying] offenders, but … it can be outweighed, applying a proportionality test, by very compelling circumstances: in other words, by a very strong claim indeed, as Laws LJ put it in the *SS (Nigeria)* case [2014] 1 WLR 998. The countervailing considerations must be very compelling in order to outweigh the general public interest in the deportation of such offenders, as assessed by Parliament and the Secretary of State.'

48. How Exceptions 1 and 2 relate to the very compelling circumstances test was addressed by Jackson LJ in *NA (Pakistan)*. In relation to serious offenders he stated as follows:

> '30. In the case of a serious offender who could point to circumstances in his own case which could be said to correspond to the circumstances described in Exceptions 1 and 2, but where he could only just succeed in such an argument, it would not be possible to describe his situation as involving very compelling circumstances, over and above those described in Exceptions 1 and 2. One might describe that as a bare case of the kind described in Exceptions 1 or 2. On the other hand, if he could point to factors identified in the

descriptions of Exceptions 1 and 2 of an especially compelling kind in support of an article 8 claim, going well beyond what would be necessary to make out a bare case of the kind described in Exceptions 1 and 2, they could in principle constitute 'very compelling circumstances, over and above those described in Exceptions 1 and 2', whether taken by themselves or in conjunction with other factors relevant to application of article 8.'

He also emphasised the high threshold which must be satisfied:

'33. Although there is no 'exceptionality' requirement, it inexorably follows from the statutory scheme that the cases in which circumstances are sufficiently compelling to outweigh the high public interest in deportation will be rare. The commonplace incidents of family life, such as ageing parents in poor health or the natural love between parents and children, will not be sufficient.'

'51. When considering whether there are very compelling circumstances over and above Exceptions 1 and 2, all the relevant circumstances of the case will be considered and weighed against the very strong public interest in deportation. As explained by Lord Reed in *Hesham Ali* at paras 24 to 35, relevant factors will include those identified by the European Court of Human Rights ('ECtHR') as being relevant to the article 8 proportionality assessment. In *Unuane v United Kingdom* (2021) 72 EHRR 24 the ECtHR, having referred to its earlier decisions in *Boultif v Switzerland* (2001) 33 EHRR 50 and *Üner v The Netherlands* (2006) 45 EHRR 14, summarised the relevant factors at paras 72-73 as comprising the following:

'• the nature and seriousness of the offence committed by the applicant;

• the length of the applicant's stay in the country from which he or she is to be expelled;

• the time elapsed since the offence was committed and the applicant's conduct during that period;

• the nationalities of the various persons concerned;

• the applicant's family situation, such as the length of the marriage, and other factors expressing the effectiveness of a couple's family life;

• whether the spouse knew about the offence at the time when he or she entered into a family relationship;

• whether there are children of the marriage, and if so, their age; and

• the seriousness of the difficulties which the spouse is likely to encounter in the country to which the applicant is to be expelled …

- the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and
- the solidity of social, cultural and family ties with the host country and with the country of destination.'

52. The weight to be given to the relevant factors falls within the margin of appreciation of the national authorities. As Lord Reed explained in *Hesham Ali* at para 35:

> '35. While the European court has provided guidance as to factors which should be taken into account, it has acknowledged that the weight to be attached to the competing considerations, in striking a fair balance, falls within the margin of appreciation of the national authorities, subject to supervision at the European level. The Convention on Human Rights can thus accommodate, within limits, the judgments made by national legislatures and governments in this area.'

Rehabilitation

53. Whilst it was common ground that rehabilitation is a relevant factor in the proportionality assessment there was some disagreement between the parties as to the reason for that and the weight that it is capable of bearing in the context of the very compelling circumstances test.

54. That it is a relevant factor is borne out by the Strasbourg jurisprudence. The time elapsed since the offence was committed and the applicant's conduct during that period is one of the factors listed in *Unuane*, drawing on the ECtHR's earlier decision in *Boultif*. This is also supported by domestic authority - see, for example, *Hesham Ali* (per Lord Reed at para 38); *NA (Pakistan)* at para 112 and, more generally, *Danso v Secretary of State for the Home Department* [2015] EWCA Civ 596.

55. In *RA* the Upper Tribunal stated as follows in relation to the significance of rehabilitation:

> As a more general point, the fact that an individual has not committed further offences, since release from prison, is highly unlikely to have a material bearing, given that everyone is expected not to commit crime. Rehabilitation will therefore normally do no more than show that the individual has returned to the place where society expects him (and everyone else) to be. There is, in other words, no material weight which ordinarily falls to be given to rehabilitation in the proportionality balance … Nevertheless, as so often in the field of human rights, one cannot categorically say that rehabilitation will *never* be capable of playing a significant role … Any judicial departure from the norm would, however, need to be fully reasoned. (para 33)

56. In *Binbuga v Secretary of State for the Home Department* [2019] EWCA Civ 551; [2019] Imm AR 1026 at para 84 I cited and agreed with that passage. The Secretary of State submitted that this approach was correct and should be endorsed as, whilst it

acknowledges that rehabilitation can be relevant, in terms of weight it will generally be of little or no material assistance to someone seeking to overcome the high hurdle of the very compelling circumstances test.

57. In the *RA* appeal, the Court of Appeal, while agreeing that rehabilitation will rarely be of great weight, did not agree with the statement that 'rehabilitation will … normally do no more than show that the individual has returned to the place where society expects him … to be' They considered that it did not properly reflect the reason why rehabilitation is in principle relevant, namely that it goes to reduce (one element in) the weight of the public interest in deportation which forms one side of the proportionality balance.

58. Given that the weight to be given to any relevant factor in the proportionality assessment will be a matter for the fact finding tribunal, no definitive statement can be made as to what amount of weight should or should not be given to any particular factor. It will necessarily depend on the facts and circumstances of the case. I do not, however, consider that there is any great difference between what was stated in *Binbuga* and by the Court of Appeal in this case. In a case where the only evidence of rehabilitation is the fact that no further offences have been committed then, in general, that is likely to be of little or no material weight in the proportionality balance. If, on the other hand, there is evidence of positive rehabilitation which reduces the risk of further offending then that may have some weight as it bears on one element of the public interest in deportation, namely the protection of the public from further offending. Subject to that clarification, I would agree with Underhill LJ's summary of the position at para 141 of his judgment:

> What those authorities seem to me to establish is that the fact that a potential deportee has shown positive evidence of rehabilitation, and thus of a reduced risk of re-offending, cannot be excluded from the overall proportionality exercise. The authorities say so, and it must be right in principle in view of the holistic nature of that exercise. Where a tribunal is able to make an assessment that the foreign criminal is unlikely to re-offend, that is a factor which can carry some weight in the balance when considering very compelling circumstances. The weight which it will bear will vary from case to case, but it will rarely be of great weight bearing in mind that, as Moore-Bick LJ says in *Danso*, the public interest in the deportation of criminals is not based only on the need to protect the public from further offending by the foreign criminal in question but also on wider policy considerations of deterrence and public concern. I would add that tribunals will properly be cautious about their ability to make findings on the risk of re-offending, and will usually be unable to do so with any confidence based on no more than the undertaking of prison courses or mere assertions of reform by the offender or the absence of subsequent offending for what will typically be a relatively short period.

59. The only caveat I would make is that the wider policy consideration of public concern may be open to question on the grounds that it is not relevant to the legitimate aim of the prevention of crime and disorder. In *Hesham Ali* it was the view of Lord Wilson that this was a relevant consideration (see paras 69 to 70) but that was not a view endorsed by the majority. That is not, however, an issue that falls for consideration on this appeal.

The seriousness of the offence

60. The seriousness of the offence is a matter which the court is required to take into account when carrying out a proportionality assessment for the purposes of the very compelling circumstances test.

61. This is made clear by section 117C(2) which states that 'the more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.'

62. This is also consistent with the Strasbourg jurisprudence. The first of the factors listed in *Unuane*, drawing on the ECtHR's earlier decision in *Boultif,* is the nature and seriousness of the offence."

The resumed hearing

18. At the resumed hearing Mr Toal relied on his skeleton argument. There was an agreed statement of facts. As between the parties there were two issues which, in terms of the evidence, the Secretary of State did not accept. They were:-

    (1) the prospect of financial support in the way of remittances should the Appellant be deported; and

    (2) the level of care the Appellant provides to his mother.

19. Mr Toal and Ms Sardar relied on a seventeen page skeleton argument. There was a consolidated bundle (CB) containing 803 pages, including witness statements from members of the Appellant's family and a letter from K. The Appellant also relied on a supplementary bundle (SB) containing 299 pages. I heard evidence from the Appellant, his mother (F), sisters (S and T) and K.

20. The Appellant and his family have made a number of witness statements throughout the lengthy proceedings. They all adopted their witnesses' statements in evidence in chief. They were cross-examined by Ms Everett on behalf of the Secretary of State. There was no challenge to their credibility. I found that the Appellant and witnesses were candid and straight forward and their evidence was internally and externally consistent. I have not set out their evidence in full. I engage with their evidence when making findings of fact.

21. There is a considerable amount of material on which the Appellant relied, including a report from Lisa Davies, a forensic psychologist of 14 February 2021 (CB/134). The report is detailed and lengthy and I will summarise Ms

Davies' findings before making findings of fact in relation to her evidence. The Secretary of State relied on an OASys report of 20 March 2019 (CB/82). I will engage with the contents of this report in my findings. I shall also engage with the background material on which Mr Toal relied and which was not before the UT in OA my findings.

The Evidence of Lisa Davies

22. Ms Davies was instructed to undertake an assessment in relation to the Appellant's risk of reoffending and whether he presented a danger to the public. She had before her all relevant material and conducted a detailed assessment on the basis of the material before her and her own clinical assessment of the Appellant. She concluded that he presents a low risk of sexual offending, a low risk of general offending and a low risk of serious harm to the public to the UK if given the right to remain. She also identified ADHD traits in the Appellant and recommended that he seek a referral through his GP for further assessment of his eligibility for treatment and support in this respect. At the time when Ms Davis assessed the Appellant his brother was in a psychiatric unit having been detained under the Mental Health Act.

23. Ms Davies commented on the methodology used by the author of the OASYs report. She said that a static measure (Risk Matrix 2000) had been used to assess the Appellant. This method uses simple factual information about the offender's past history and produces risk estimates that are group estimates and do not directly correspond to the recidivism risk for an individual offender. There are dynamic factors and situational factors which are not considered. She has assessed risk using a different type of assessment; the Risk of Sexual Violence Protocol (RSVP) which incorporates dynamic risk factors such as: maintenance of supportive and familial relationships, encouragement and support from prosocial others to obtain goals and live a stable lifestyle free from offending, engagement in leisure activities and meaningful occupation of his time and a GP referral to discuss eligibility for treatment and psychoeducation of ADHD.

24. Ms Davies set out her methodology in some detail and indicated that the Appellant was fully engaged in the assessment. She considered the Appellant's personal history, education and employment, relationship and psychosexual history, substance use history and forensic history. She took into account a letter from Oxleas NHS Foundation Trust of 28 February 2013 reporting that the Appellant was at that time close to completing the Youth in Need Young Persons Sex Offender Treatment Programme which he was assessed for in 2009 and that his involvement in the group was positive and he was described as having engaged well. She noted that it was the opinion of group facilitators and the treatment team that he presented a low risk of further sexual offending.

25. The Appellant reported to Ms Davies that he used to be very disorganised and that he was forgetful. Ms Davies commented on the Appellant's notification failures in respect of the SOR. She recorded that he had said

to her that on one occasion he went on holiday and did not notify the police five days before he flew which he was required to do. He recalled another time when he went to Paris with his girlfriend.

26. The Appellant completed a screening measure for ADHD. She diagnosed ADHD. She set out her methodology in her report. She stated that "[a]ssessment using the ACE+ indicates that [the Appellant] currently meets criteria for a diagnosis of ADH in accordance with DSM-5; ADHD combined subtype". She recommended that the Appellant make an appointment with his GP to discuss treatment interventions for ADHD. She stated that the Appellant's profile indicates that he experiences difficulties with sustaining his attention and may struggle to complete tasks and activities, leaving these unfinished and moving on to something new. He may avoid tasks that require sustained mental effort. He has a tendency to daydream and experience difficulties with listening and following conversations. His profile indicates significant difficulties with his organisation, planning and timekeeping skills. She identified that treatment of the Appellant's core ADHD symptoms may reduce the likelihood of the Appellant using substances in the future although she noted that he appeared to be committed to long-term abstinence and his engagement in boxing was likely to be an additional protective factor.

27. Ms Davies' conclusions and opinion are contained at [9.0] of the report as follows:-

> 9.1 This report has been prepared on the basis of the documentation I have examined in Appendix B. I reserve the right to make amendments in the light of any additional information of which I have not yet been made aware. I have been instructed to undertake an assessment of [the Appellant's] risk of offending and mental health functioning.
>
> 9.2 In the preparation of this report, I interviewed [the Appellant] on 10 February 2021 using remote video conferencing facilities (Zoom) due to a state of lockdown in the UK as a result of COVID-19. The assessment lasted for five hours and was continued on 11 February 2021 for a further three hours, totalling eight and a half hours' clinical assessment. I have utilised structured assessment measures to assist in clinical risk formulation and judgment that account for [the Appellant's] previous engagement in offending behaviours. I have assessed [the Appellant] in respect of his risk using the Level of Service/Case Management Inventory (LS/CM1, Andrews, Bonta and Wormwith, 2012) to assess the risk of him committing further offences. I have assessed the risk of him committing further sexual offences using the RM2000 (Thornton, 2010) to provide a static assessment of his sexual risk and utilised the risk of Sexual Violence Protocol (RSVP, Kropp et al, 2003), a structured assessment of the risk of sexual violence incorporating dynamic risk factors. I have used the Structured Assessment of Protective

Factors (SAPROF, Vogel et al, 2012) to assess for the presence of protective factors that would actively reduce the risk of further offending.

…

9.4 Assessment using the level of service case management inventory (LS/CPI, Andrews. Bonta and Wormwith, 2011) indicates that the likelihood of [the Appellant] engaging in further offending behaviours is considered to be low at the current time.

9.5 The Risk Matrix 2000 (RM 2000); Thornton et al, 2003; 2010 (is a statistically driven risk classification process intended for males aged at least 18 years who have been convicted of a sexual offence. According to this assessment, [the Appellant] is placed in the medium risk category for sexual recidivism on this instrument based on his offending and personal history. When compared to a sample of male offenders released from prison in England and Wales with these risk characteristics, 2% of these individuals sexually reoffended over two years and 3% reoffended over four years. The RM2000 does not account for [the Appellant's] progress in treatment. His dynamic risk has been assessed using the RSVP [Kropp et al, 2000] to determine if there are any outstanding treatment needs or dynamic risk factors that indicate a need for further treatment interventions to reduce the level of risk posed by [the Appellant] and to provide a current assessment of his sexual offending risk.

9.6 Assessment using the RSVP (Kropp et al, 2003), a structured assessment of the risk of sexual violence, indicates a low risk of future sexual offending at the current time. There has been no further sexual offending since 2009 and [the Appellant] demonstrates good insight into his offending and engaged in a relevant treatment programme to address his sexual risk factors. He accepts full responsibility for the offence and acknowledges the impact on the victim. There are no responsivity concerns. [The Appellant] has since engaged with the Probation Service and completed his licence period. He has no current need for external controls or further interventions to address his sexual risk.

9.7 Assessment using the SAPROF (Vogel et al. 2012), a structured assessment of protective factors that reduce the risk of further offences, indicates that there are a high number of protective factors present at the current time that could further reduce the risk or maintain the low risk identified as presented by [the Appellant]. Goals and areas where further development is needed include address his current financial situation and determining if he is eligible for treatment and support for ADHD. He is currently subject to tag and curfew for the purposes of

immigration bail; he has successfully completed his licence and supervision period and there have been no recent concerns regarding his conduct in the community. I do not regard these controls as necessary for the ongoing management of [the Appellant's] (low) risk and would support an application for removal of these external controls on the basis of his current assessed risk levels.

9.8 In conclusion, having reviewed the evidence contained within the documents available and my own clinical assessment of [the Appellant] on 10 and 11 February 2021, totalling eight hours and 30 minutes of clinical assessment time, in my psychological opinion, it is considered that [the Appellant] presents with a low risk of sexual offending, a low risk of general offending and as low risk of serious harm to the public in the UK.

9.9 I would recommend that he seek a referral through this GP for further assessment of his eligibility for treatment and support in relation to the identified ADHD traits. I would support an application for removal of the current external controls that are in place, i.e. curfew and electronic tagging.

Findings and Reasons

Article 3

28. There is no need for me to set out the background evidence in full. I have referred in my findings to the evidence Mr Toal referred me to which was not before the UT in OA. The submissions that Mr Toal relied on were in the main those that had been made in OA and rejected by the UT. Despite the manner in which the case was presented before me this is not a country guidance case. While Ms Everett accepted that there had been a deterioration in humanitarian conditions in Somalia, both parties stated that they were not asking the Tribunal to depart from OA. However, in my view accepting Mr Toal's submissions would amount to an unjustified departure from the Country Guidance.

29. I must apply the guidance given by the UT in OA and the parts of MOJ which have been preserved. I also recognise that the guidance relates in parts to internal relocation, which is not the issue in this case. I also remind myself of the high test for Article 3. I have considered factors set out at [407(h)] of MOJ which still apply following OA.

30. The Appellant was born in Somalia. He lived in Mogadishu before leaving Somalia when he was aged seven or eight. He then lived in Yemen until travelling to the United Kingdom when he was aged fourteen. The Appellant's family are members of a minority clan and left Somalia fleeing from persecution. I accept that the family has not returned to Somalia and that they do not have a nuclear family or close relatives in Mogadishu. Considering the limited means of the family, I find it unlikely that they

have sent funds to support anyone in Somalia. However, I have taken into account what the UT said in OA about links between clan members in the diaspora and in Mogadishu.

31. The Appellant is unlikely to receive significant remittances from his family in the United Kingdom. He is presently accommodated by his mother who is on universal credit. The household bills have been funded by her and the Appellant's sister who has been working but is now a student on limited funds. The family's income has decreased. I find that access to financial resources from his family in the United Kingdom will be limited. However, this Appellant is resilient, motivated, employable and physically fit.

32. I have taken into account what the UT in OA said about MOJ and minority clans with reference to [407(f)]) of MOJ; however, that was in the context of the Reer Hamar. While the Appellant's evidence that he has no family in Somalia was not challenged, I have had regard to what the UT said about network at [243] – [261], particularly at [256]. I have considered what was said at [259] about minority clans providing assistance.

33. The Appellant would need to establish links with his clan in order to find a guarantor. I reject Mr Toal's argument about the nature of the Appellant's criminality becoming an obstacle to this because of the nature of the Appellant's crime. The same argument was rejected by the UT in OA at [280] where the UT referred to a criminal record generally not putting a returnee at enhanced degree of risk of societal or clan-based rejection. There is no support for drawing a distinction between types of criminality. Minority clan membership would not amount to an insurmountable obstacle to an informal guarantor and the Appellant's criminal record would not enhance the risk of clan-based rejection.

34. The Secretary of State's facilitated return would be sufficient for several weeks. I have taken into account that the Appellant's personal circumstances could make it difficult for him to reconnect with his clan and find a guarantor. He has never lived in Somalia as an adult. He would be returning as someone who fled persecution as a minority clan member. It is unlikely that he will have language difficulties, but I accept that ADHD will present him with challenges. He does, however, manage to maintain paid employment and unpaid work in the United Kingdom. The Appellant is resourceful and hardworking. Taking into account all these factors I find that it is reasonably likely that the Appellant would find a guarantor through his clan network.

35. It is for the Appellant to explain why he would not be able to access the economic opportunities created by the economic boom in Somalia. He has attributes and work experience that would put him in good stead. The humanitarian situation which I engage with below, may make it more difficult than it was at the time the UT decided OA. However, in terms of the type of employment that may be available to the Appellant (unskilled manual labour), there is no requirement for the Secretary of State to find

work for the Appellant or for the Appellant to expect to find work in Mogadishu that he is qualified to do in the United Kingdom. I note what the UT said in respect of similar submissions made by Mr Toal in OA at [269].

36. Mr Toal relied on an UNCHR report of September 2022 to support a submission that youth unemployment in Somalia is at 67 percent. While I agree with him that the figure is alarming, it represents the whole of Somalia including rural areas which have been badly impacted by drought. It does not seek to represent the situation specifically in Mogadishu.

37. It was agreed by both parties that there is a drought and famine in Somalia which must be factored into the assessment. Ms Everett accepted a deterioration in conditions generally. Mr Toal made extensive submissions on this point. He referred me to [229] of OA, where the UT, whilst accepting Ms Harper's evidence that conditions in Mogadishu were difficult (and that many returnees will face considerable practical challenges when seeking to establish themselves in a city to which hundreds of thousands have been and continue to be displaced), endorsed the finding in MOJ at [421] that the humanitarian position had improved and the famine confined to history. He said that it was this that underpinned the findings in OA, but the position has now deteriorated and it is not the case that famine is confined to history. In support of this he referred me to the background information which was before the UT in OA which has since been updated (see [27] of his skeleton argument) to support that the numbers of those in "crisis" and "emergency", described as Integrated Food Security Phase Classification (IPC) 3 and 4 in Southern and Central Somalia have increased from 2.1 million to 6.7 million and the number of IDPs have increased from 1.1 million to 3.8 million.

38. Mr Toal referred me to the definitions of IPC 3 and 4 which reflect crisis and emergency phases of acute food insecurity. He relied on the Country Policy and Information Note South and Central: Security and Humanitarian Situation: Version 5.0 November 2020 (CPIN 2020) (a document which was before the UT in OA). He relied on remarks made to the press by the Under Secretary General for Humanitarian Affairs and Emergency Relief Coordinator for the United Nations, Martin Griffiths concerning Mogadishu and delivered to the press on 5 September 2022. Mr Griffiths stated that "famine is at the door, and today we are receiving a final warning". He said that, "There are concrete indications that famine will occur in two areas of the Bay region, Baidoa and Burhakaba districts) in central Somalia between October and December". This is attributed to "unprecedented failure of four consecutive rainy seasons, decades of conflict, mass displacement, severe economic issues". He described Baidoa is the "epicentre of the humanitarian crisis in Somalia". He stated that "a similar tragedy is unfolding in Banadir, not far from Mogadishu". He stated the drought is forecast to continue.

39. My attention was drawn to a document entitled "IPC" of 12 September 2022. The salient facts from the document are that approximately 6.7

million people across Somalia are expected to face IPC Phase 3 or worse acute food insecurity between October and December 2022. IPC phase 5 is projected among agropastoral populations in Baidoa and Burhakaba districts and displaced people in Baidoa Bay region in Southern Somalia. Several areas in central and Southern Somalia have an increased risk of famine through at least December 2022 namely the Hawd Pastoral of Central and Hiraan, Addun Pastoral of Northeast and Central, Coastal Deeh Pastoral of Central; Sorghum High Potential Agropastoral of Middle Shabelle; and IDP Settlements in Mogadishu, Carowe, Galkacyo and Dallow. It is said that Emergency (IPC Phase 4) levels of acute malnutrition and rising mortality levels are already occurring in those areas. If humanitarian food assistance is not scaled up and sustained, then acute food insecurity and malnutrition are expected to deteriorate further and faster between October and December 2022 with approximately 6.7 million people or 41% of the population expected to face crisis (IPC Phase 3) or worse outcomes. (It is not entirely clear from the table relied on by Mr Toal in his skeleton argument at [27], that this is a predicted figure rather than a figure reflecting the position as at 12 September 2022).The report states that the urban poor continue to struggle to feed themselves in the face of rising food prices and have limited room to absorb the impact of further food price increases and limited opportunities to expand their income.

40. I accept that the background evidence establishes a worsening humanitarian situation in Somalia generally. The predictions are dire. However, the evidence establishes that the people most at risk are those in agriculture or rural areas and/or IDPs. While negative effects will probably trickle down to those in urban areas, this Appellant is not an IDP; he is a returnee to Mogadishu from the West and therefore in a group which the UT found in OA ([278]) to be significantly underrepresented in IDP camps and informal settlements. He will not be relying on employment in agriculture. I note how the UT in OA engaged with similar submissions made by Mr Toal on the evidence that was then available. At [230] the UT accepted that conditions elsewhere in Somalia have been characterised by a cycle of extreme weather events but the impact of them in Mogadishu was less acute.

41. While acknowledging that return to Mogadishu will be very difficult for this Appellant, who will also have to contend with the additional difficulties faced by the urban poor as a result of food price increases, properly applying OA and taking into account the further evidence relied on by Mr Taol, I conclude that returning this Appellant to Mogadishu would not be in breach of the United Kingdom's obligations under Article 3.

Exception 1 - Section 117C (4)(a) – (c) of the 2002 Act

42. The Secretary of State accepts that the Appellant has been lawfully resident in the United Kingdom for most of his life.

43. At the hearing, following Ms Everett's submission on the point, I indicated that in my view the Appellant was socially and culturally integrated in the United Kingdom. In CI (Nigeria) v SSHD [2019] EWCA Civ 2027 the court at [79] decided that time in prison can weaken integrative links as can prolonged association with criminals/criminal lifestyle but decision makers must be cautious of double counting. I find that this Appellant has very strong ties to the United Kingdom. Integrative links were formed before the commission of criminal offences and after. He has worked in the United Kingdom. He has family links here. I have taken into account his extensive links with the boxing club (I engage specifically with this later in my decision). It was conceded by the Secretary of State that the Appellant has been here lawfully for most of his life. I do not find that periods of criminality and prison sentences have broken social and cultural integrative links.

44. I do not find that the Appellant has established very significant obstacles to integration into Somalia. I have taken into account what was said by Sales LJ in Kamara v SSHD [2016] EWCA Civ 813; 2016 4 WLR 152 at paragraph 14 namely as follows:-

> "The idea of 'integration' calls for a broad evaluative judgment to be made as to whether the individual will be enough of an insider in terms of understanding how life in the society in that other country is carried on and a capacity to participate in it, so as to have a reasonable opportunity to be accepted there, to be able to operate on a day-to-day basis in that society and to build up within a reasonable time a variety of human relationships to give substance to the individual's private or family life."

45. The Appellant would not be considered an outsider. He has grown up with Somalian parents and there is no evidence that he does not speak the language. I rely on my findings in respect of Article 3 ECHR.

Section 117C (6) of the 2002 Act - "very compelling circumstances"

46. The Appellant cannot meet the exceptions in s117C. Therefore it is necessary for me to conduct a proportionality assessment, taking into account the high threshold test of very compelling circumstances.

47. The Appellant is a serious offender. His deportation is in the public interest. In this case, I do not rely on one particular feature of the Appellant's case, but I find that cumulatively the factors against deportation outweigh those for, notwithstanding the strong weight to be attached to the public interest.

48. The Appellant lives with his mother and one of his sisters. He has two sisters who are now full-time students. His mother is in receipt of universal credit. She is a refugee. She has a number of health problems. There was no medical report; however, her medical notes were produced. I accept that she has a number of physical health problems including

incontinence and arthritis. She also has depression. She said in evidence that her husband had left her because of her health conditions. She described a close relationship with the Appellant who supports her. There was no medical evidence of her needs; however, I accept that as a result of his mother's ill health including mobility issues, she is dependent on her son and two daughters. I accept that the relationship between the Appellant and his mother is particularly close, partly as a result of her distress concerning her eldest son's situation. His has very poor mental health and his circumstances are precarious. At the time of the hearing before me, he was not detained under the MHA but he was unwell and difficult to locate. This causes his mother much anxiety.

49. Ms Everett accepted that the Appellant cared for his mother, but she did not accept that the relationship could be described as a Kugathas relationship (Kugathas v SSHD (2003) INLR 170). However, I find that there is such a level of dependency between the adult Appellant and his mother. I accept that there is no evidence of the level of practical care that is required. Her conditions may not warrant a high level of practical care, but I accept that her needs are presently, at least in part, taken care of the Appellant. While the evidence does not establish that his care is indispensable to his mother because he has siblings, I accept that the Appellant has a special bond with his mother and assists her with facilitating contact with her eldest son which alleviated her anxiety. It is the substance and not the form of the relationship that matters and I take account of the principles summarised by the Court of Appeal in Uddin v SSHD [2020] EWCA Civ 338, in particular that identified at [40 (iii)] namely as follows:-

> "the continued existence of family life after the attainment of majority is also a relevant question of fact. No negative inference should be drawn from the mere fact of the attainment of majority, while continuing cohabitation after adulthood will be suggestive of ongoing real, effective or committed support which is the hallmark of a family life."

50. I accept that the Appellant's oldest brother has mental health problems exacerbated by cannabis addiction. The witnesses described the eldest son of the family falling off the radar. When this happens the Appellant is able to find him, which can take between 2-3 days, and facilitate communication between the him and their mother. The Appellant's mother came across as mentally and physically very fragile. There is a witness statement from the Appellant's father in the United Kingdom; however, I accept that his role in the Appellant's life is minimal. He has now left the family home. I am in no doubt that the impact of deportation on the Appellant's mother would meet the elevated test of unduly harsh, although I recognised that the relationship of adult son and mother is not one covered by the exceptions in s.117C of the 2002 Act.

51. The Appellant's sisters are full-time students of limited means. They both depend on student funding (loans). T lives independently. S lives with the Appellant and their mother. While the latter has in the past financially

supported the Appellant, I accept that the family's disposable income has sharply decreased because S is now in full-time education and supported by student funding (a loan). In respect of support from family members in the United Kingdom should the Appellant be deported, I find that the family would make every effort to help him, however, there will going forward be very little disposable income. I accept that they will not be able to offer him any meaningful financial support. The Appellant accepted in oral evidence that they would try to help him but questioned how they would be able to. I accept that there will be a lot of pressure on the Appellant's sisters to abandon their studies and find employment and to assist their mother financially and practically should the Appellant be deported. The Appellant's employment opportunities are limited while he does not have status here and is at risk of deportation. However, he has qualifications to work on the railways and is likely to be able to work if he is allowed to remain here. He explained that his employment is night work, and his mother does not need him during the night.

52. K was an impressive witness. He works for the Department of Health as an IT professional. In evidence he adopted his letter (character reference) of 30 May 2022. He is an English Boxing Coach and he and others are involved in an organisation called Unity Boxing located in a high crime area. The organisation has been recognised by the local council as effective in helping young people. It has the endorsement and the support of a large European boxing promoter.

53. K has known the Appellant through Unity Boxing for five or six years. He is aware that he has convictions for serious offences; however, in his view the Appellant is an "unsung hero". He has given so much of his time to the organisation. He is lively and easy going. He is able to communicate with young people. He has helped others for no financial gain. He has steered troubled children in a positive direction. He is considerate, caring and empathetic. His involvement has left an "indelible mark" on the club's success. The club intends for the Appellant to undergo courses because he would be an ideal England Boxing assistant. He is an "up and coming young star in his own right".

54. I find that over the last five or six years the Appellant has served Unity Boxing. He has helped the organisation to help others. He has shown motivation and commitment to help others. In oral evidence the Appellant described the benefits of boxing and how it has helped him. He said that boxing had changed his life. I have no doubt that he has gained benefit from the activity as well as helped others. He has provided funds to the organisation; however, I accept that this came from the Appellant raising funds rather than from his own pocket. He was recalled to give evidence on this point and was not cross-examined. I find that the Appellant has played a pivotal and positive role in Unity Boxing.

55. The Appellant has committed very serious offences. The more serious the offence committed by a foreign criminal the greater the public interest in

deportation.[5] The sentencing comments of the Judge in 2009 paint a very grim and disturbing picture. The Judge said that he was in no doubt that the victim, a seventeen-year-old student had firmly rejected the Appellant's approach, but that the Appellant was seeking sexual satisfaction and determined to obtain it by force if necessary. He dragged the victim behind a bus stop where he kissed her and touched her breast and attempted to put his hand down her trousers. He then dragged her onto a broken and deserted bus where he attempted to orally rape her. The victim escaped and he pursued her forcing her to masturbate him. He then threatened to kill the victim.

56. This Appellant has twice failed to comply with notification requirements of the SOR. He has a further drug conviction for possession of cannabis in 2014. He was sentenced to a community penalty with which he failed to comply on five occasions. He committed a second serious offence in 2013 involving the supply of class A drugs (heroin). He was convicted of this offence on 18 April 2018 and sentenced to 18 months imprisonment. The impact of the offences committed by this Appellant on his victims is damaging and life changing. The seriousness of the offences is exacerbated by failures to comply with SOR notification requirements and the terms of a community penalty. All these factors weigh heavily in favour of deportation.

57. It is significant that the offence for which the Appellant was convicted on 18 April 2018 was committed in 2013. The sentencing Judge commented that the drugs that the Appellant was supplying "were a very small quantity….and what is unusual in that some four years have passed." He stated the following:

> "[the Appellant] had carried out your own rehabilitation. From a person who was in a difficult financial position, you have been able to become qualified as a maintenance worker on the railways. You spent a considerable amount of money getting that qualification and I have heard about the full pack of qualifications that you have obtained. That requires conscientiousness, it requires dedication, and it shows a desire to lead an honest life"

58. The sentencing Judge said that he was impressed by the report from the boxing club and that the Appellant has commanded considerable respect from youth work and that he had been of considerable assistance to the organisers of the club. The judge said that this was an indication of a change in character and change of outlook and that he was impressed by the voluntary work that the Appellant undertook for a mosque. The Judge passed the shortest sentence he thought to be appropriate.

59. There are two pieces of evidence relied on by the parties to address the issue of risk of re- offending/harm and rehabilitation. Ms Everett relied on the OASYs assessment of 20 March 2019. The content of that assessment can be summarised;

[5] Section 117C (2) of the 2002 Act

(a) The Appellant presents a medium risk of serious harm namely sexual assault to adult females and a medium risk of harm to the public.

(b) There has been no evidence of further offending of this nature since 2009 and the Appellant has completed an offending behaviour programme addressing his sexual offences and was able to describe the deficits in his thoughts and attitudes which were linked to the offence and the changes that he has made.

(c) Risk factors are identified as, relapsing into cannabis use, unemployment leading to robbery, ambivalence towards SOR requirements, lack of structure to his day, association with negative individuals, sexual preoccupation and focus on his own sexual needs.

(d) The Appellant has previously completed the Adolescent Sex Offender Treatment Programme.

(e) There are factors identified would reduce the risk namely, engaging in work to review and reinforce strategies learnt on previous offending behaviour programme, licence conditions, training and employment, financial stability, pro-social goals and engagement in positive hobbies and activities.

(f) The Appellant at the time of the report was described as currently MAPPA Cat 1 and MAPPA level 1 and in respect of re-offending the OASYs report gives the following probabilities:-

OGRS3 probability of proven re-offending – 35/53% (Medium)

OGP probability of proven non-violent reoffending – 23/35% (Medium)

OVP probability of proven violent -type reoffending – 14/24% (Low)

60. The Appellant relied on the report of Chartered Forensic Psychologist Lisa Davies of 13 February 2021. I have set out her conclusions at length. While the Secretary of State relied on the 2019 OASys report, there was no challenge to the report of Ms Davies. I find there is no tension between the assessments. Ms Davies having conducted the same assessment as the author of the OASys report reaches the same conclusion; however, she conducted another assessment using a different method which reached a conclusion more favourable to the Appellant. Mr Toal's submission was that Ms Davies' report contains a more accurate assessment. Her overall conclusion is that the likelihood of the Appellant engaging in further offending of any nature at the current time is low.

61. I find that the methodology employed by Ms Davies is more likely to be accurate as it takes into account the dynamic protective factors and the circumstances of this Appellant. It is a more detailed assessment of the Appellant. I accept that at the date of the hearing the Appellant presented

as a low risk of reoffending generally including sexual violence which would reduce the assessment of harm caused if he is to re-offend.

62. Both reports identify factors that reduce or increase risk. I find that the evidence before me establishes that at present there are factors in play that reduce risk and an absence of factors that might increase risk. I accept Ms Davies' evidence that there are a high number of protective factors present. They are still in play at the date of the hearing and I find that there is stability as far as the protective factors are concerned. The Appellant is employable as a result of his own efforts (see the judge's sentencing comments in 2018). He is not smoking cannabis. He has stability and positive involvement with the boxing club. Low risk of reoffending/serious harm does not equate with no risk. However, I find that the Appellant is rehabilitated. He is living a productive and lawful life. He is employable. He engages in meaningful and worthwhile activity.

63. Ms Davies concluded that the Appellant has ADHD. Mr Toal asked me to take this into account and what it said about the Appellant's organisational skills in the report when considering his failures to comply with SOR notification and community orders. On the face of the Appellant's record, there is a picture of non-compliance with court orders which could potentially impact on a risk assessment. I accept the diagnosis of ADHD. I take on board Ms Everett's submission in respect of the condition mitigating the Appellant's non-compliance. She drew my attention to the evidence of Mr Khadiri that the Appellant was able to step in and organise coaching sessions at the boxing club. Ms Davies reports the Appellant having difficulties sustaining attention, completing tasks and activities and difficulties listening and following conversations. She stated that the Appellant's profile indicates significant difficulties with planning and timekeeping skills. However, she also notes his preference for physical activities which is likely to be a means of managing his restlessness. I did not hear evidence about the duration of the coaching sessions or what level of sustained concentration is required. However, having read the report of Ms Davies, I do not find that the diagnosis would necessarily impact the Appellant's ability to coach children.

64. In respect of the notifications under the SRO, the Appellant told Ms Davies that he had signed on late or had gone on holiday forgetting to notify the police. I find that ADHD could partly account for the non-compliance. What is clear is that this Appellant did not seek to avoid detection so that he could remain "underground" or perpetrate further offences of a sexual nature or generally. I have also taken into account the letter from the Appellant's Community Offender Manager Nicola Thompson dated 7th June 2019 which indicates that he has complied with conditions of supervision and demonstrated a good level of engagement and compliance. I have taken into account that he committed a serious sexual offence in May 2009 and there has been no further commission of sexual offences. He completed the Adolescent Sex Offender Programme, receiving a positive appraisal of his progress on the programme.

65. The Appellant has been here since he was a child. He would not meet the three limbs of Exception 1 because he cannot establish that there are very significant obstacles to integration (although he satisfies the other two limbs). He presents a low risk of re-offending generally. He has not committed offences since 2015. His conduct since then has been exemplary. He has solid social cultural and family ties in the United Kingdom having been here lawfully most of his life. I take into account that commonplace incidents of family life such as aging parents in poor health will not be sufficient to meet the test; however, the Appellant's mother is particularly vulnerable and she is dependent on him. The efforts that this Appellant has gone to lead a lawful and productive life are significant. In my view the Appellant is not only rehabilitated (a factor that cannot be excluded from the proportionality assessment), he has actively pursued ways to improve himself through education, sport and helping others. I accept that the Appellant is rehabilitated in a way that could be properly described as positive and therefore in this case rehabilitation is worthy of more weight than it might otherwise be. In respect of my analysis of the risk of re-offending and rehabilitation generally I have attached weight to the evidence of Ms Davies which was not subject to any meaningful challenge. I find that the Appellant has done his utmost to turn his life around and become a valuable member of society.

66. I remind myself that the public interest in deportation is threefold. There is a need to protect the public from further offending but there are also the wider considerations of deterrence and public concern. However, this Appellant has been in the United Kingdom since he was a child. His ties to Somalia are tenuous. Return there would not reach the Article 3 threshold (or s117C (4)(c)), but living there would be extremely difficult for him. He would be returning to a country from which he and his family fled persecution as minority clan members which adds another layer of difficulty (in addition to having ADHD). I accept the evidence of the Appellant in his witness statement concerning negative memories of Somalia. I have made findings about the impact on the Appellant's mother of his deportation to which I attach weight. I also attach some weight to the family's difficulties should they be put into a situation where they have to send money to the Appellant in Somalia and that this is likely to involve his sisters having to make different life choices.

67. Considered cumulatively the factors that weigh in favour of the Appellant amount to a very strong claim and they therefore tip the balance in his favour. I find that there are very compelling circumstances in the context of s.117C (6). The appeal is allowed under Article 8.

68. The appeal is dismissed under Article 3.

69. The appeal is allowed under Article 8.

Notice of Decision

The appeal is allowed under Article 8.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed *Joanna McWilliam* Date 14 November 2022
Upper Tribunal Judge McWilliam